No. 16,298

In the

United States Court of Appeals

For the Ninth Circuit

VIRGINIA J. KING, as Administratrix of the Estate of John Elvins King,
Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS, a corporation,
Appellee.

Reply by Appellee in Opposition to Appellant's Petition for a Rehearing

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SUBJECT INDEX

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STATUTES

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Preliminary Statement

In their Petition for Rehearing, Appellant's counsel have cited numerous new authorities and advanced new contentions not previously made in Appellant's two prior briefs. In view of this, we believe a further written reply on behalf of Appellee Pan American is appropriate.

In their petition, Appellant's counsel advance two new contentions and one old one:

(1) That in *The Tungus v. Skovgaard,* February 24, 1959, 358 U.S. 588, 3 L.Ed. 2d 524, the United States Supreme Court "held" that the operation of Section 7 of the

Death on the High Seas Act was restricted to State territorial waters;

(2) That the construction by this Court of the exclusive remedy provision of the California Workmen's Compensation Act (California Labor Code Section 3601) is "contrary" to an authoritative opinion of the California Supreme Court construing this same section;

(3) That where the locality of an accident is upon the high seas or navigable water, exclusive jurisdiction is conferred upon the admiralty courts, and application of State law in such situation violates the United States Constitution.

We will answer these contentions in the order listed.

The Tungus Case Did Not Pass Upon the Effect of Section 7 of the Death on the High Seas Act Outside State Territorial Waters.

The *Tungus* case involved the death of an oil company maintenance man while engaged in repair work on a ship docked in the port of Bayonne, New Jersey. The decedent's widow filed an action in admiralty against the ship and its owners (who were *not* the decedent's employers) to recover damages under the New Jersey State wrongful death act. Two questions were posed on appeal: (1) had the lower courts properly construed the State wrongful death act, and (2) were the Federal courts, in granting relief, restricted by the State wrongful death act or might plaintiff recover in situations not covered by the State act. The Court held: (1) the plaintiff's claim *was* limited to the State wrongful death act, and (2) the Court of Appeals had correctly construed that act. The Court's opinion began by noting "the established principle of maritime law, that in the absence of a statute there is no action for wrongful

death"; and then stated that, notwithstanding the Jones Act and the Death on the High Seas Act:

> "No Federal statute is applicable to the present case; Skovgaard was not a seaman[5], and his death occurred upon the territorial waters of New Jersey[6]."

Footnote 6 reads as follows:

> "The Death on the High Seas Act creates a right of action only for a 'wrongful act, neglect, or default occurring on the high seas *beyond a marine league from the shore of any state* * * *' 46 U.S.C. 761." (Emphasis added.)

It seems quite clear that the Court's reference to the reason the Death on the High Seas Act was inapplicable referred—not to Section 7 (as Appellant's counsel impliedly asserts)—but to Section 1 of the Act (46 U.S.C. Sec. 761).

The Court then rejected the argument that the admiralty courts might engraft upon the State-created right of action additional Federal remedies not existing in the absence of the State right of action, in this respect quoting the Senate Committee Report on the Death on the High Seas Act, as follows:

> "The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to "leave unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States." S Rep No. 216, 66th Cong. 1st Sess 3; HR Rep No. 674, 66th Cong. 2d Sess 3. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong Rec 4482-4486." (3 L.Ed. 2d at 529)

It is obvious that neither the facts nor the holding of the Court in *The Tungus* case in any way involved the opera-

tion of State statutes (let alone State workmen's compensation acts) beyond the territorial waters of the State and that the Supreme Court in no sense construed, or had occasion to construe, the meaning of Section 7 of the Death on the High Seas Act in that regard. If the language of the Court quoted above, however, be deemed to cast any light on this question, we submit it favors the position of Appellee, rather than of Appellant. The Senate Committee Report quoted in the Court's opinion related to the *original* draft of the Death on the High Seas Act *as reported from committee,* Section 7 of which would by implication have eliminated operation of State statutes beyond State territorial waters. It was because Congressman Mann objected to such elimination that he introduced the Mann Amendment, so that (in the words of the Supreme Court) "The power of the States * * * [would] in no way be affected by enactment of the Federal law." The Mann Amendment, of course, was adopted and is embodied in Section 7 in its present form.

The quotation by Appellant's counsel from *Echavarria v. Atlantic and Caribbean Steam Navigation Co.,* 1935, 10 Fed. Supp. 677, was previously set out in their closing brief, and needs no further answer here.[1]

We submit that *The Tungus* does not support Appellant's contentions in this case.

Subsequent and Authoritative Opinions of the California Supreme Court Demonstrate that North Pacific Steamship Co. vs. I.A.C. Does Not Represent Current California Law.

We agree with Appellant's counsel that the meaning of California Labor Code Section 3601, which makes work-

1. See Supplemental Brief for Appellee Pan American, page 10, footnote 3.

men's compensation (where applicable) "the exclusive remedy against the employer * * *", is best determined by consulting the opinions of the California Supreme Court. We do not agree, however, that *North Pacific S.S. Co. v. I.A.C.,* 1917, 174 Cal. 346, 163 Pac. 199, constitutes valid authority as to the proper meaning of that statute. The *North Pacific* case was decided on February 3, 1917. The language quoted by Appellant's counsel (from pp. 355-356) was used by the Court in an effort to sustain jurisdiction of the Industrial Accident Commission over an injury to a *seaman* injured while his ship was upon the high seas, and was an attempt to square the result the Court sought to reach with the proposition that the traditional maritime remedies of *seamen* could not be affected. The effect of *Southern Pacific v. Jensen,* 244 U.S. 205, 61 L.Ed. 1086, decided by the United States Supreme Court three months later on May 21, 1917, was of course to overrule the *North Pacific Steamship* case.[2]

Two subsequent California Supreme Court opinions make it clear that the *North Pacific Steamship* case has also been overruled as to its construction of the "exclusive remedy" provision and that this provision is intended, where applicable, to exclude otherwise applicable admiralty remedies. In *City of Oakland v. Industrial Accident Commission,*

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2. While the *North Pacific Steamship* case was not itself reversed by the United States Supreme Court (since apparently certiorari was not applied for), its companion cases, *Steamship Bowdoin Co. v. Pillsbury,* 174 Cal. 390, 163 Pac. 204 and *Alaska Pacific Steamship Co. v. Pillsbury,* 174 Cal. 389, 163 Pac. 204 (decided on February 7, 1917, four days after the *North Pacific* case in brief opinions citing and relying upon the *North Pacific* case) did go to the United States Supreme Court and were reversed by that Court in one-sentence opinions "upon the authority of *Southern P. Co. v. Jensen* * * *" in *Steamship Bowdoin Co. v. Industrial Accident Commission,* 244 U.S. 648, 62 L. Ed. 919, and *Alaska Pacific Steamship Co. v. Industrial Accident Commission,* 1918, 244 U.S. 648, 62 L.Ed. 920.

1926, 198 Cal. 273, 244 Pac. 353, the City of Oakland challenged an award granted by the Industrial Accident Commission to one of its employees, injured while working as a deckhand or "donkeyman" on a barge tied up at a City wharf in the Oakland Estuary. The Court discussed the facts, the applicable authorities, and affirmed the award, stating:

> "We are of the opinion, therefore, that, under the circumstances stated, *the exclusive features of the Workmen's Compensation Act* of the state apply and *abrogate any remedies the injured employee would have under the general admiralty jurisdiction.* (Grant Smith-Porter Ship Co. v. Rohde, supra; Miller's Indemnity Underwriters vs. Braud, supra). On the authority of these decision we are satisfied that to permit the rights and liabilities of the parties to this proceeding to be determined by the respondent Commission, under the provisions of the Workmen's Compensation Act, will not in any way interfere with the characteristic features of the general maritime rules." (198 Cal. at pages 276-277; emphasis added.)

Alaska Packers Association v. I.A.C., 1927, 200 Cal. 579, 253 Pac. 926 (subsequently affirmed in *Alaska Packers Association v. I.A.C.,* 1928, 276 U.S. 467, 72 L.Ed. 656, cited and discussed in this Court's opinion in the instant case) is likewise to the same effect.

Contrary to Appellant's Contention, Admiralty Does Not Have Sole and Exclusive Jurisdiction as to all Occurrences Whose "Locality" Is Upon Navigable Waters, Particularly in the Case of Industrial Accidents. State Law May Operate Save Where It Would Materially Prejudice the Essential Uniformity of the General Maritime Law or Is Excluded by Act of Congress.

The final half of the Petition for Rehearing cites a variety of authorities for several different propositions. The

principal authorities, and the propositions for which they are cited, appear to be as follows:

(1) That admiralty has exclusive jurisdiction, to the exclusion of State law, over any and all occurrences whose "locality" is upon the high seas or navigable waters:

The Plymouth (Hough v. Western Trans. Co.) 1866, 70 U.S. 20, 18 L.Ed. 125;

The Lottawanna (Rodd v. Heartt) 1875, 88 U.S. 558, 22 L.Ed. 654;

The Moses Taylor, 1867, 71 U.S. 408, 18 L.Ed. 397.

(2) That there is a significant distinction, applicable here, between admiralty jurisdiction over the high seas, and over State territorial waters:

Southern Steamship Co. v. N.L.R.B., 1942, 316 U.S. 31, 86 L.Ed. 1246;

U. S. v. Rogers, 1893, 150 U.S. 255, 37 L.Ed 1071.

(3) That the Death on the High Seas Act supersedes State law as to deaths occurring on the high seas:

Lingren v. U. S., 1930, 281 U.S. 39, 74 L.Ed. 686.

Two propositions at once become evident upon even the most casual study of these cases: (1) they are almost uniformly old, even "ancient", and (2) the fact situations involved are almost uniformly wholly dissimilar to that presented in the instant case.

We will discuss these cases in the order cited.

(1) The Contention That Admiralty Jurisdiction Is Exclusive by Reason of the "Locality" of the Accident.

The Plymouth (*Hough v. Western Trans. Co.*), 1866, 70 U.S. 20, 18 L. Ed. 125, does contain the language Appellant quotes. That case, however, actually dealt with the question whether the owner of a wharf in the City of Chicago,

allegedly destroyed by a fire negligently caused by a vessel tied up to the wharf, might sue the vessel and its owners in admiralty. The Court held that since the property damaged was on land, admiralty had *no* jurisdiction and rejected the contention that the fact the fire allegedly originated on the vessel created admiralty jurisdiction. It was in this connection that the Court used the language quoted by Appellant, and it must of course be read in the light of these facts.[3]

The Lottawanna (*Rodd v. Heartt*) 1875, 88 U.S. 558, 22 L. Ed. 654, involved a claim of a materialman for a lien against a ship. The Court held that Federal admiralty law created no lien in favor of materialmen; that the admiralty courts would nevertheless enforce the liens created by State law, stating in this connection:

> "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of materialmen furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation." (88 U.S. at 579, 22 L. Ed. at 663)

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3. Appellant's counsel note (at page 7 of the Petition for Rehearing) that *The Plymouth* has been cited with approval in various cases, citing certain of them. These cases likewise seem completely not in point.

Kermarec v. Transatlantique, 1959, 358 U.S. 625, 3 L. Ed. 2d 550, involved a claim against a shipowner by a visitor (not an employee), injured while visiting "aboard a ship upon navigable waters" (3 L. Ed. at page 553).

Berwind-White Coal Mining Co. v. City of New York, CCA 2, 1943, 135 Fed. 2d. 443, involved the question whether the admiralty court had jurisdiction over a suit upon a maritime contract (and specifically an indemnity clause of the contract) between a railroad company and the City of New York, with respect to maintenance and removal of a railroad trestle built over navigable water in the port of New York.

Citation of *The Plymouth* in *The Rohde* case (*Grant Smith-Porter Ship Co. v. Rohde,* 1922, 257 U.S. 469, 66 L. Ed. 321) demonstrates, we suggest, that *The Plymouth* is consistent, rather than inconsistent, with our position in this case.

but that the materialman in the instant case had no valid lien, since he had failed to perfect it in compliance with applicable State law.

The Moses Taylor, 1867, 71 U.S. 411, 18 L. Ed. 397, held that a State court had no jurisdiction *in rem* as to an action brought by a passenger against a steamship upon a maritime contract, noting that jurisdiction in the admiralty Court as to such controversies "has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of its legislation the State might have taken cognizance of these causes." (71 U.S. at 430, 18 L. Ed. at 402)

The two cases last discussed demonstrate that, contrary to Appellant's contention, application of State law in maritime matters has a long and respectable history.

Instead of *The Plymouth* having established that any occurrence upon navigable water becomes at once *exclusively* of admiralty jurisdiction, as Appellant asserts, it did not even establish the proposition that the mere fact the "locality" of an occurrence was on navigable water was sufficient to confer admiralty jurisdiction (if the occurrence was not otherwise of a maritime nature). This question was *expressly reserved* by the United States Supreme Court in 1914 in the case of *Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52, 58 L. Ed. 1208, involving the question whether an admiralty court had any jurisdiction over a stevedore's action for personal injuries against his employer.[4] In an opinion by Justice Hughes, the Court first noted *The Plymouth* line of cases containing language that maritime "locality" was sufficient in itself, then noted the defendant's contention "that in every adjudicated case in this country

4. It is curious that Appellant's counsel cited both the lower court opinions in the *Imbrovek* case (Appellant's Petition for Rehearing, Page 11) but omitted to refer to the United States Supreme Court opinion in that case.

in which the jurisdiction of admiralty with respect to torts has been sustained, the tort, apart from the mere place of its occurrence, has been of a maritime character" (234 U.S. at pages 60-61, 58 L. Ed. at page 1212) and then held it was not "necessary to enter upon this broad inquiry" since, in any event "the wrong which was the subject of the suit was, we think, of a maritime nature, and hence the District Court, from any point of view, had jurisdiction." (*Idem.*)[5]

The decisive answer to Appellant's argument about "locality", of course, is to be found in the *Rohde, Braud, Alaska Packers,* etc. line of cases.[6] Each of these cases held that the particular occurrence there involved had a maritime "locality" sufficient to confer admiralty jurisdiction in the absence of a State compensation act, but that such acts abrogated the otherwise applicable admiralty remedy. The proposition that "locality" is not the all-controlling factor in the instant type of situation—as Appellant would have it—is perhaps best demonstrated by the language of Chief Justice Taft in *London Guarantee & A. Co. v. Industrial Accident Commission,* 1929, 279 U.S. 109, 73 L. Ed. 632, in discussing and explaining the *Rohde, Braud,* and *Alaska Packers* cases. In pointing out that in those cases State workmen's compensation acts were properly held to exclude otherwise applicable admiralty remedies, Chief Justice Taft said:

> "[Those cases] may be said to be of an amphibious character. They have an admiralty feature about them

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5. See also the opinion of this Court in *Campbell v. H. Hackfield & Co.,* 1903, C.C.A. 9, 125 Fed. 696, holding that admiralty tort jurisdiction requires, in addition to maritime "locality", that "maritime relations of some sort must exist", and that stevedore employment was not of a sufficiently maritime nature to satisfy this requirement. This case must be deemed overruled on its facts by the *Imbrovek* case, which held stevedore employment *was* of a maritime nature, but it is noteworthy that the *Imbrovek* case did *not* disapprove of the remainder of the *Campbell* opinion.

6. Cited and discussed at pages 10-11 of this Court's opinion in this case, and at pages 20-22 of Appellee's original brief.

in the locality where they occurred, although even this is doubtful with respect to the Alaska case. But the contract in the Rohde Case was nonmaritime, the ship was incomplete, and being completed under a nonmaritime contract, both parties had made a nonmaritime contract with reference to their liabilities and not in contemplation of the admiralty law. The Braud Case was one of a maritime tort. *But it had no characteristic feature of the general maritime law except locality,* and it was very like in its relation to the state law to the Rohde Case. *The employment was not maritime, and the transaction and the circumstances thus seemed to have but one characteristic that was maritime.* (279 U.S. at 121, 73 L.Ed. at 635-636; emphasis added.)"[7]

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7. In its actual holding in the *London Guarantee* case, the Court set aside an award of the California Industrial Accident Commission granted for the death of a *seaman,* employed on a fishing vessel in Santa Monica Bay, who was drowned while seeking to rescue a drifting vessel. The Court stated that (in contrast to the cases discussed above):

> "Here it is without dispute that the deceased was a *sailor; that his employment and relation to the owner of the vessel were maritime.* It is without dispute that the vessel in the navigation of which he was employed was registered as a vessel engaged in the navigable waters of the United States in the business of transporting people for hire. He was a skipper engaged in assisting the navigation of these registered vessels from their mooring place in Santa Monica bay to the place where the deep-sea fishing was to be carried on, a distance of from 3 to 5 miles or more, all in navigable waters. The vessels were capable of navigation for 500 miles. *There was no feature of the business and employment that was not purely maritime.*" (279 U.S. at 123, 73 L. Ed. at 636; emphasis added)

and held that to apply a State workmen's compensation act in such a situation "would certainly be prejudicial to the characteristic features of the general maritime law."

The case cited at page 8 of Appellant's Petition for Rehearing, *Alaska Packers Assn. v. Alaska Industrial Board,* 1950, 88 Fed. Supp. 72 (affirmed in *Alaska Industrial Board v. Alaska Packers Assn.,* 1951, C.A. 9, 186 Fed. 2d 1015, an opinion of this Court by Justice Denman) followed the *London Guarantee* case. In holding

This quotation wholly refutes any contention of Appellant that the admiralty courts have exclusive jurisdiction of any and all industrial accidents (regardless of the nature of the employment) provided only their "locality" is maritime.

(2) The Alleged Distinction Between the High Seas and Navigable Waters.

The allegedly important distinction between the high seas and State territorial waters which Appellant suggests (at page 11 of the Petition for Rehearing) is contradicted, rather than supported, by the cases there cited. Thus, *Southern Steamship Co. v. N.L.R.B.,* 1942, 316 U.S. 31, 86 L. Ed. 1246, held that the laws against mutiny governed a ship's crew both on the high seas and while in port, and therefore set aside a reinstatement order of the N.L.R.B. on the ground the N.L.R.B. improperly held that seamen conducting a "strike" while their ship was *in port* were not guilty of misconduct barring reinstatement. In *U. S. v. Rodgers,* 1893, 150 U.S. 255, 37 L. Ed. 1071, the Court held that a criminal statute covering assaults made by persons "upon the high seas, or in any river * * * within the admiralty jurisdiction of the United States" was applicable to an assualt committed on a vessel in the Detroit River in the Great Lakes, on the Canadian side of the international line. Not only do these opinions reject the distinction Appellant seeks to make, but they are so completely dissimilar from the issues in the instant case that we fail to see how they are remotely in point.

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that Alaska's workmen's compensation act could not be applied to a seaman, Judge Denman pointed out (at p. 1016) that

> "The obligations and correlative rights of the owner of a vessel to the members of her crew constitute one of the most important of the 'characteristic features of the general maritime law' which",

under the *Jensen* doctrine, could not be affected by State legislation.

In our case, unlike the *Rohde, Braud* and *Alaska Packers* cases, the decedent's employment was not even "amphibious", but was *wholly* non-maritime.

(3) The Alleged Supersession of State Law by the Death on the High Seas Act.

Lingren v. U. S., 1930, 281 U.S. 38, 74 L.Ed. 686, held that in enacting the Jones Act, granting rights of action against a seaman's employer in negligence for personal injuries or death of a seaman, Congress intended to exclude actions against an employer for a seaman's death based upon State wrongful death acts. This holding is totally unlike the situation presented here. The *Lingren* case involved a specific act of Congress expressly regulating the rights and remedies between seamen and their employers as to industrial injuries *in a specified employment.* The Jones Act has no section comparable to Section 7 of the Death on the High Seas Act, expressly preserving State jurisdiction, and no legislative history showing that the intent of Congress was to preserve such jurisdiction.

Appellant argues that a right of action under a Federal statute cannot be abrogated by State law. It is clear, however, under the *Rohde, Braud, Alaska Packers* line of cases that in general Federal admiralty remedies *may* be abrogated in this type of situation by State workmen's compensation acts. Whether this is true of the Death on the High Seas Act is, of course, purely a matter of Congressional intent. As this Court held, the language, purpose and legislative history of the Death on the High Seas Act clearly demonstrates that it was enacted by Congress merely to fill a void in the law, and that it was not the intent of Congress to supersede State workmen's compensation acts, or their exclusive remedy provisions. The complete failure of the Petition for Rehearing, like Appellant's prior briefs, to discuss the language, purpose or legislative history of the Act is, we submit, the clearest evidence that this Court's holding was correct.

Miscellaneous Points Answered

Appellant's counsel state (Petition for Rehearing, page 8) that they know of "no case" in which admiralty jurisdiction has not attached for a death on the high seas. We reply by stating that we know of no case (and Appellant's counsel have cited none) holding that industrial injuries of airline crews, whether occurring over the high seas or elsewhere, are not covered by State workmen's compensation acts and their exclusive remedy provisions.

Appellant's counsel suggest that the pecuniary advantages of a cause of action under the Death on the High Seas Act exceed those of a remedy under the State Compensation Act. Counsel of course concede that this, even if true, is without legal relevance. When, however, the unavoidable hazards, uncertainty and delay of a common law action for negligence are taken into account (particularly in an accident where an airplane is lost at sea, without survivors), Appellant's suggestion seems dubious indeed. It seems worthy of comment, in this connection, that—as Appellant's counsel expressly conceded at the oral argument—Appellant has found it to her advantage not to appeal from the Industrial Accident Commission award but has instead accepted its benefits.

Conclusion

The foregoing demonstrates that the new contentions advanced by the Appellant in the Petition for Rehearing are without merit. Appellant's counsel have completely failed to demonstrate any error in this Court's opinion, or any reason why a rehearing should be granted.

Appellant's Petition for Rehearing should therefore be denied.

Dated at San Francisco, California, on November 20, 1959.

Respectfully submitted,

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